NGOI THIAM WOH

v.

MAXWELL KENION COWDY & JONES & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-894-1999]
5 JULY 2002

LAND LAW: *Mortgage - Power of sale - Mortgagee advertised sale of security upon mortgagor's default in loan repayments - Whether mortgagee had a right to advertise sale without applying for an order of court - Whether loan was secured under an absolute assignment - Whether contractual rights as determined between parties should be given effect to*

BANKING: *Securities for advances - Defendant finance company advertised sale of security upon plaintiff's default in loan repayments - Whether defendant had a right to advertise sale without applying for an order of court - Whether loan was secured under an absolute assignment - Whether contractual rights as determined between parties should be given effect to*

TORT: *Defamation - Advertisement of sale of security by defendant finance company upon plaintiff's default in loan repayments - Whether plaintiff defamed by said advertisement - Whether defendant had an absolute right to advertise sale - Whether words complained of true in fact and substance - Whether there was conspiracy, fraud or negligence on part of defendant*

The 2nd defendant, a licensed finance company, granted a loan to the plaintiff for the purchase of a condotel. The plaintiff executed a deed of assignment as security for the loan in favour of the 2nd defendant. The assignment was an absolute assignment. The plaintiff defaulted in his loan instalments and that led to the 1st defendant, a firm of solicitors acting for the 2nd defendant, advertising in the local newspaper a proclamation of sale of the said condotel. The plaintiff brought this action against the defendants praying for, *inter alia*, an injunction restraining the defendants from further advertising and publishing the said proclamation of sale. Also, for aggravated and general damages. In their defence, the defendants claimed, *inter alia*, that the words complained of were true in fact and in substance. The issues were: (1) whether the 1st defendant acting on the instructions of the 2nd defendant had defamed the plaintiff by causing the advertisement of the said proclamation of sale; and (2) whether the plaintiff could sustain an action in defamation against the

defendants upon the trial judge (in the 2nd defendant's action against the plaintiff for the loan sum) having held that there was no conspiracy, fraud or negligence on the part of the 2nd defendant.

Held:

[1] In the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser (*Phileoallied Bank (M) Bhd v. Bupinder Singh a/l Avatar Singh & Anor*, FC). Since in the present case there was an absolute assignment, the 2nd defendant had an absolute right to proceed to advertise the proclamation of sale and to auction off the condotel without applying for an order of court. It followed that as the 2nd defendant had the absolute right to proceed with the proclamation of sale, the 1st defendant who acted as solicitors and thus as agents of the 2nd defendant were clearly acting within the law when they caused the advertisement to appear in the local newspaper. (pp 751 f-g, i & 752 a)

[2] Although the trial judge had dismissed the 2nd defendant's claim against the plaintiff claiming for the loan sum, he also dismissed the plaintiff's contention of misrepresentation, conspiracy, fraud and negligence on the part of the 2nd defendant and the related companies. As there was no appeal in relation thereto, the finding of the trial judge must be accepted as correct. In the circumstances, both questions posed before this court must be answered in the negative. (p 752 b-c)

[Suit dismissed.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***
MBf Finance Bhd v. Ngoi Thiam Woh [2001] 7 CLJ 221 ***(refd)***
Phileoallied Bank (M) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 ***(foll)***

Legislation referred to:

National Land Code, s. 221
Rules of the High Court 1980, O. 31, O. 33 r. 2, O. 83

For the plaintiff - Ngan SH (Ahmad Yani); M/s Abbas & Ngan
For the 1st defendant - Silvanathan (Rathi Nair); M/s Kean Chye & Sivalingam
For the 2nd defendant - Loh Yen Zin; M/s Jeyaratnam & Chong

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The plaintiff, the executive director of Eltean Incorporated Sdn. Bhd. with offices in Singapore, Jakarta, Manila and Malaysia, purchased one unit of condotel in Penang from MBF Property Services Sdn. Bhd. The 2nd defendant, a licenced finance company made available to the plaintiff a sum of RM232,650 to pay for the balance of the purchase price of the condotel to be repaid by 156 equal monthly instalments of RM2,383.62. The plaintiff executed a deed of assignment as security for the loan in favour of the 2nd defendant. There was an absolute assignment of the property from the plaintiff to the 2nd defendant and according to cl. 6.03 of the deed of assignment, the assignee, the 2nd defendant, was given the power to enforce all rights and remedies under the sale and purchase agreement and to do all other things including the right to sell by private treaty. On the plaintiff defaulting in his instalment payments to the 2nd defendant, the 1st defendants, a firm of solicitors practising in Ipoh and acting for the 2nd defendant, issued, on instructions, a notice of demand dated 21 October 1997 to the plaintiff demanding a sum of RM9,949.88 being instalments due to the 2nd defendant for the months of July to September 1997 together with penalty interests and other costs. Receiving no response the 1st defendants sent another letter dated 22 November 1997 to the plaintiff enclosing a notice of default and demanding from the plaintiff to make good the alleged default upon the expiry of seven days, failing which the 2nd defendant would exercise its rights to sell the plaintiff's unit of condotel. On 1 December 1997 the 1st defendants sent a letter to the plaintiff containing a notice of termination pursuant to the deed of assignment and requesting the plaintiff to vacate the premises. The defendants then on 9 January 1998 advertised in the 'Star' newspapers a proclamation of sale of the said condotel. It is necessary reproduce the entire proclamation of sale which reads as follows:

PROCLAMATION OF SALE
Between

MBf Finance Berhad	Assignee/Lender
And	
Ngoi Thiam Woh	Assignor/Borrower
NRIC No. 530922-08-5273)	

In the exercise of the rights and powers conferred upon the Assignee/Lender under a Loan Agreement Cum Deed of Assignment both dated 19th November, 1994 between the Assignor/Borrower and the said Assignee/Lender with the assistance of the undermentioned Auctioner.

WILL SELL BY
PUBLIC AUCTION

On Friday the 23rd day of January, 1998

At 11.00 in the morning

In the premises of No. 117, 1st Floor
Bangunan Persatuan Melayu Jalan Macalister, 10400 Pulau Pinang

The subject property is a hotel suite known as No. 4, on the 5th Floor of Sandy Bay Paradise Hotel, Jalan Tanjung Bungah, Penang.

Particulars of Title

Title: No individual title

Floor Area: 70.14 square metres (755 square feet)

Beneficial Owner: Ngoi Thiam Woh

Encumbrances: Assigned to MBf Finance Berhad

Location and Description of the Property: The subject property is a one bedroom hotel suite within Sandy Bay Paradise Hotel which is located on the north side of Jalan Tanjung Bungah at about 10 kilometres north-west of the City centre and a kilometer east of Tanjung Bungah town. The subject property accommodates a living/dining area, a kitchen, a bedroom, a bath/wc and two balconies.

Reserve Price: The property will be sold subject to a reserve price of RM275,000 (Ringgit Malaysia: Two Hundred And Seventy Five Thousand Only).

All intending bidders are required to deposit with the Auctioneer a sum equivalent to 10% of the reserve price by bank draft in favour of Messrs. Maxwell, Kenion, Cowdy & Jones before the auction sale. For further particulars please apply to Messrs. Maxwell, Kenion, Cowdy & Jones at Wisma Makencone, No. 31, Jalan Tun Sambanthan, 30000 Ipoh, Perak Darul Ridzuan Tel: 05-2551225 or to the undermentioned Auctioneer.

77-C Jalan Datuk Haji Eusoff,
Damai Complex
50400 Kuala Lumpur
Tel: 03-4427528/Atur: 012-3374424 Or

M.Mogan
Licensed Auctioneer

SYARIKAT DAYA MAJU
No. 117, 1st Floor, Bangunan Persekutuan
Melayu, Jalan Macalister, 10400 Pulau Pinang
Tel: 04-2287270.

The plaintiff then filed a suit in the High Court at Ipoh, Civil Suit No. 22-24-98, against the 2nd defendant and others and has obtained an injunction to restrain the 2nd defendant from selling the said unit until the disposal of the case. In the meantime the 1st defendants filed an Originating Summons No. 24-269-98 (the OS) at the Penang High Court on behalf of the 2nd defendant for an order of court under O. 31 of the Rules of the High Court 1980 (the RHC) to sell the plaintiff's condotel. The 2nd defendant then withdrew the said OS and filed a fresh originating summons under O. 83 of the RHC. In the meantime the 2nd defendant filed another suit in the Ipoh High Court *vide* Suit No. 22-68-99 against the plaintiff to recover the loan sum together with interest amounting to RM262,100.47 still owing to the 2nd defendant by the plaintiff.

Case For The Plaintiff

It is the plaintiff's case that by publishing the proclamation of sale the defendants had disgraced him nationally and had subjected him to public scandal, odium and contempt. The plaintiff further claimed that by such a proclamation of sale the defendants had caused to be conveyed and perceived by the reading public that the plaintiff was and still is not credit worthy, is a dishonourable person, is financially unsound, is likely to be made a bankrupt, is a person of low repute and is an unreliable businessman. He further contended that due to the said advertisement he has been blacklisted by the bank and that his name has since appeared on the electronic data base. It is the plaintiff's case that the said advertisement was published contrary to law. The plaintiff prayed for:

1. An injunction restraining the 1st and 2nd defendants from further advertising and publishing the said proclamation of sale.
2. Aggravated damages in the sum of RM12,000,000.
3. General damages.
4. Interests.
5. Costs.
6. Such further relief as the court deems fit.

Case For The Defendants

The 1st defendants' defence was that they had acted according to law as provided in the various sections in the deed of assignment. It was their case that the advertisement of the intended public auction was not only an action to protect the interests of the 2nd defendant but it was meant to ensure that sufficient potential buyers would tender the best offer so as to ensure the acquisition of the property at the best price for the benefit of the plaintiff as well as the 2nd defendant. The 1st defendants denied that the words

complained of bore any defamatory meaning on the plaintiff from the point of view of right thinking members of society. They also pleaded that the words complained of were true in substance and in fact and not defamatory as the plaintiff had failed to repay his instalments under the loan agreement and deed of assignment. The 1st defendants also relied on qualified privilege. The 2nd defendant's defence was more or less similar to that of the 1st defendants'.

Findings Of The Court

During case management parties agreed that I decide the case pursuant to O. 33 r. (2) of the RHC which empowers this court to order any question or issue arising in a cause or matter whether of fact or law or partly of fact and partly of law to be tried before at or after the trial of the cause or matter. The 1st defendants then posed four questions to be answered by the court pursuant to O. 33 r. 2 of the RHC. Subsequently parties by consent distilled the four questions to two. The two issues to be determined by the court based on affidavit evidence were as follows:

1. Whether the 1st defendants acting as solicitors for the 2nd defendant on the instructions of the 2nd defendant have defamed the plaintiff by causing the advertisement of the proclamation of sale dated 9 January 1998.

2. Whether the plaintiff can sustain an action in defamation against the defendants upon the High Court at Ipoh (see *MBf Finance Bhd. v. Ngoi Thiam Woh* [2001] 7 CLJ 221) having held that there was no conspiracy or fraud and negligence on the part of the 2nd defendant.

There is no dispute that there is a loan agreement and that pursuant to the said loan agreement the sum of RM232,650 was to be paid by 156 equal monthly instalments. There is also no dispute that the plaintiff had executed a deed of assignment in favour of the 2nd defendant. The question is, could the 2nd defendant have instructed the 1st defendants to advertise the proclamation of sale. This issue has now been put to rest by the recent decision of the Federal Court in *Phileoallied Bank (M) Bhd v. Bupinder Singh a/1 Avatar Singh & Anor* [2002] 2 CLJ 621 wherein Abdul Malik Ahmad FCJ very succinctly summarised the view of the court when he said at pp. 640-641 as follows:

> ... that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.

Since in the case before me too there was an absolute assignment, the 2nd defendant had an absolute right to proceed to advertise the proclamation of sale and to auction off the condotel without applying for an order of court.

Since the 2nd defendant had the absolute right to proceed with the proclamation of sale the 1st defendants who acted as solicitors and thus as agents of the 2nd defendant were clearly acting within the law when they caused the advertisement to appear in the 'Star' .

In any case in Civil Suit No 22-68-99 filed by the present 2nd defendant against the present plaintiff claiming the loan sum, whilst the trial judge dismissed the 2nd defendant's claim, he however dismissed the present plaintiff's contention of misrepresentation, conspiracy, fraud and negligence against the 2nd defendant and the related companies. (See *MBF Finance Bhd v. Ngoi Thiam Woh (supra)*). Since Encik Ahmad Yani for the plaintiff confirmed that there was no appeal from the decision in *MBF Finance Berhad* by his client the finding of the learned trial judge must be accepted as correct.

In the circumstances this court answered both questions in the negative.

In the cause of his submission, Encik Ahmad Yani argued that the lease cum assignment agreement is contrary to s. 221 of the National Land Code. When I questioned Encik Ahmad Yani why he did not raise this issue before the learned trial judge in *MBF Finance Bhd*. and whether he was not caught by the decision of the Federal Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 FC which held that parties are prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently, I was surprised by Encik Ahmad Yani's answer that the issue of fraud and conspiracy were "not done exhaustively" before the trial judge in *MBF Finance Bhd*. At this stage Mr Ngan, co-counsel for the plaintiff continued with the submission by saying that only at a trial could the plaintiff show that he had been continuously harrassed by the defendants. To my mind this was no longer an issue because it was by consent that parties had agreed to submit the two questions to be answered by this court by agreeing to proceed pursuant to O. 33 of the RHC. It was, therefore, too late in the day for Mr. Ngan to back-track and to ask for a trial. Besides, even if his client was indeed harassed, there was no reason why the plaintiff could not have averred details of such harassment, if any, in his affidavits. To a specific question as to why there were no affidavits to this effect Mr. Ngan conceded that he had no direct evidence but he would be able to prove harassment by calling witnesses. Again, the plaintiff has failed to respond to the issue. Why could this witness not have filed an affidavit?

I, therefore, had no hesitation in answering both questions in the negative. I therefore, dismissed the suit with costs.